

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BILLY DEAN CORWIN II**

Claimant

VS.

**U.S.D. #501**

Self-Insured Respondent

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Docket No. 1,004,897

**ORDER**

Respondent requested review of the March 29, 2004 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 27, 2004.

**APPEARANCES**

Paul D. Post of Topeka, Kansas, appeared for the claimant. John A. Bausch of Topeka, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Board should affirm the Administrative Law Judge's (ALJ) determination of claimant's average gross weekly wage. Respondent further noted the sole issue was whether it had established that claimant had a preexisting functional impairment and was entitled to a K.S.A. 44-501(c) reduction in the compensation awarded.

**ISSUES**

The ALJ found the claimant suffered a 24 percent permanent partial scheduled disability to the right upper extremity. But the ALJ did not reduce the award of compensation by claimant's alleged preexisting functional impairment.

The sole issue argued on review by respondent is whether it is entitled to a deduction for claimant's preexisting functional impairment. Respondent argues the claimant had a 12.5 percent preexisting functional impairment and after deduction of that amount from claimant's current functional impairment claimant would only be entitled to compensation for the additional 11.5 percent functional impairment due to his May 16, 2002 accidental injury.

Conversely, the claimant argues respondent has failed to meet its burden of proof to establish the percentage, if any, of preexisting functional impairment. Claimant argues the preexisting rating relied upon by respondent was not determined according to the required standards in the *AMA Guides*<sup>1</sup>. Claimant further argues that his shoulder was essentially asymptomatic in the ten years he worked for respondent before the current injury to his shoulder. Consequently, claimant requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is whether respondent met its burden of proof to establish the percentage of claimant's preexisting functional impairment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The sole dispute for Board determination is whether respondent met its burden of proving what, if any, functional impairment existed before claimant's May 16, 2002 accident.

The ALJ determined that as a result of claimant's injury to his shoulder on May 16, 2002, the claimant suffered a 24 percent permanent partial functional impairment to the right shoulder. The Board affirms and adopts that finding.

Claimant testified he had previously suffered a strain to his right shoulder in 1987, and settled two docketed workers compensation claims for \$3,600 based upon that previous injury. In a letter dated May 6, 1988, Dr. Lowry Jones Jr. rated claimant's shoulder disability as between 10-15 percent.<sup>2</sup> But Dr. Jones did not indicate which version of the *AMA Guides*, if any, he used to arrive at his rating. Nor was there an explanation for why the doctor provided a range of disability rather than a specific percentage.

The parties were under the assumption that Dr. Jones must have used the *AMA Guides*, Third Edition Revised, because the respondent's attorney noted that he believed that was the version used at the time of Dr. Jones' rating.<sup>3</sup> And the parties further agreed that the standard used to rate a shoulder was the same in the Third Edition Revised and Fourth Edition of the *AMA Guides*. However, the Third Edition Revised did not have its first printing until 1990 which was well after Dr. Jones provided his rating for claimant's

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> Geis Depo., Resp. Ex. 4.

<sup>3</sup> Geis Depo. at 7.

shoulder.<sup>4</sup> There is no evidence in the record comparing the methodology for rating a shoulder in the Third Edition versus the Fourth Edition.

Dr. Peter V. Bieri evaluated and rated the claimant on June 25, 2003. Based upon the *AMA Guides*, Fourth Edition, claimant's range of motion deficits (14 percent) and residuals of the acromioplasty (10 percent) were combined and rated by Dr. Bieri as 23 percent to the right upper extremity. Dr. Bieri further estimated the claimant's preexisting impairment to be 5 percent and when deducted from the 23 percent leaves an 18 percent right upper extremity impairment due to the accidental injury on May 16, 2002. But Dr. Bieri agreed that his determination of claimant's preexisting impairment was merely an "estimate" and required a certain amount of speculation.

The doctor testified:

Q. Now, based upon your history obtained from Mr. Corwin, along with the medical record that you referred to earlier from Dr. Geis, did you assign a portion of that to a preexisting - - a portion of that rating to a preexisting condition?

A. I did.

Q. What was the apportionment in this particular case?

A. The documentation failed to provide me definitive information so I estimated the impairment from the preexisting condition, which to me was based on range of motion deficits, which were described as quote, "greater than 90 degrees", unquote. The only range of motion deficits that I could find that would relate to that would be flexion and abduction, and by utilizing the range of motion table on Pages 43 to 45, I estimated five percent upper extremity impairment. So it was strictly an estimate on my part, then I subtracted that from the total.<sup>5</sup>

Dr. Bieri further commented that upon review of Dr. Jones' 1988 letter, it was confusing whether Dr. Jones was rating the claimant's shoulder or the whole body in his 1988 letter. Moreover, Dr. Bieri noted that Dr. Jones practices in Missouri and that state utilizes disability ratings as opposed to the functional impairment ratings used in Kansas. And Dr. Bieri noted the terms do not mean the same thing.<sup>6</sup> Lastly, Dr. Bieri opined that he could not justify the 10-15 percent impairment which Dr. Jones had rated the claimant in 1988.

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<sup>4</sup> *AMA Guides*, (3rd ed. rev.).

<sup>5</sup> Bieri Depo. at 12-13.

<sup>6</sup> *Id.* at 34.

On February 25, 2003, Dr. Dick Geis examined the claimant, took a history, reviewed medical records and then provided a rating. Dr. Geis opined that the 10-15 percent rating by Dr. Jones in May 1988 would be the same under the *AMA Guides*, Fourth Edition. But this was based upon the assumption that Dr. Jones had used the *AMA Guides*, Third Edition Revised, to determine his disability rating in 1988. Dr. Geis opined that the claimant now had a 16 percent upper extremity impairment based on range of motion loss.

In order to arrive at a preexisting impairment percentage, Dr. Geis simply converted Dr. Jones' 1988 whole body disability to an upper extremity value of 12 percent. Dr. Geis then subtracted the 12 percent preexisting from his 16 percent rating to arrive at an additional 4 percent permanent partial functional impairment due to the claimant's May 16, 2002 accidental injury.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.<sup>7</sup> (Emphasis Added)

And functional impairment is defined by K.S.A. 44-510e(a) (Furse 2000), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) (Furse 2000) requires that functional impairment be determined based upon *AMA Guides*, Fourth Edition. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria and this approach has been upheld by the Court of Appeals.<sup>8</sup>

The standard used to determine functional impairment percentage in Kansas has changed over the years from competent medical evidence to the mandated use of the *AMA Guides*, Third Edition Revised and then to the *AMA Guides*, Fourth Edition. Accordingly,

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<sup>7</sup> K.S.A. 44-501(c) (Furse 2000).

<sup>8</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003). Copy attached pursuant to Sup. Ct. Rule 7.04.

any preexisting functional impairment must be adjusted to conform to the present standard. Stated another way, a preexisting functional impairment rating provided using a different version of the *AMA Guides* or simply based upon competent medical evidence without any reference to the *Guides* must be adjusted or converted to a rating under the *AMA Guides*, Fourth Edition, in order to qualify for a K.S.A. 44-501(c) (Furse 2000) deduction.

Requiring the application of the same standard in the determination of both the preexisting as well as the current functional impairment percentage results in a final comparison of equal value percentages. Simply stated, it requires an apples to apples comparison. This accomplishes a fair comparison in order to meet the statutory mandate to only compensate for the increased disability caused by the current injury. Otherwise, reliance upon percentages derived using different standards potentially provides a final comparison of unequal values. Simply stated, that would be an apples to oranges comparison.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) (Furse 2000) reduction. In *Mattucci*<sup>9</sup>, the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. **The rating for a prior disability does not establish the degree of disability at the time of the second injury.**" 241 Kan. at 593. (Emphasis added)

It should be recognized that the determination of a functional impairment percentage by a physician is not an exact science. Nor is the number assigned an absolute. An impairment percentage represents an informed estimate and different physicians evaluating the same person, using the same standard, can arrive at widely divergent percentages of functional impairment ratings. An injured worker's condition can improve or worsen with the passage of time. Again, that is why the determination of the preexisting functional impairment percentage at times requires review of numerous factors and the evidence that a claimant has previously received a functional impairment rating is, at times,

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<sup>9</sup> *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000). Copy attached pursuant to Sup. Ct. Rule 7.04.

not absolutely controlling. Moreover, a functional impairment percentage agreed upon as part of a lump sum compromise settlement may take into consideration many factors unrelated to the functional impairment percentage, such as the rights to future medical treatment or review and modification.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of his activities in the intervening years in order to determine the preexisting impairment.<sup>10</sup> Those factors must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

On the other hand, if a preexisting condition has been rated, as in this case, then it must be determined whether the rating physician utilized the *AMA Guides* and, if so, which edition of the *Guides* was utilized. As previously noted, it must be shown that the preexisting rating conforms to the rating under the *AMA Guides*, Fourth Edition or must be adjusted to conform to the appropriate edition of the *Guides*.

The evidence regarding claimant's preexisting impairment consists of Dr. Jones' 1988 rating that claimant had a 10-15 percent shoulder disability. Dr. Bieri's opinion claimant had a 5 percent preexisting functional impairment to his shoulder and Dr. Geis' opinion claimant had a 12 percent preexisting functional impairment to his shoulder.

An analysis of each doctor's determination of claimant's preexisting impairment is necessary. As previously noted, Dr. Jones provided a 10-15 percent disability rating to claimant's shoulder in 1988. There is no indication how the doctor arrived at that percentage range, nor which edition of the *AMA Guides*, if any, the doctor utilized. And for claimant's 1987 shoulder injury the functional impairment could be established by the competent medical evidence standard as there was no statutory requirement to utilize the *AMA Guides*.<sup>11</sup> The exhibits offered to establish Dr. Jones' 1988 rating do not indicate which edition was used.<sup>12</sup>

It is significant to note that both Drs. Bieri and Geis testified that a percentage rating arrived at using the *AMA Guides* should result in a definite percentage of impairment rather than a range of disability as indicated in Dr. Jones' letter. This is further evidence that Dr.

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<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

<sup>11</sup> K.S.A. 1987 Supp. 44-510e(a).

<sup>12</sup> Geis Depo., Resp. Ex. 4 and 5.

Jones did not use the *AMA Guides* in arriving at his range of disability for claimant's shoulder.

Although the parties agreed that the standard used to rate the percentage of shoulder impairment was the same in the *AMA Guides*, Third Edition Revised and Fourth Edition, nonetheless, the 1988 rating provided by Dr. Jones predated both of those versions of the *Guides*. And Dr. Bieri testified he did not know what methodology was used to rate a shoulder in the *AMA Guides*, Third Edition. Consequently, respondent has not met its burden of proof to establish that Dr. Jones' preexisting rating would be the same under the *AMA Guides*, Fourth Edition. Nor was testimony proffered to adjust or convert Dr. Jones' preexisting rating to a rating pursuant to the *AMA Guides*, Fourth Edition.

Moreover, Dr. Geis indicated that a rating based upon range of motion of the shoulder requires a determination of the range of motion in six planes and that the testing be done multiple times according to the *AMA Guides*, Fourth Edition. Again, Dr. Jones' letter only described claimant's range of motion values derived in two planes of motion. And, as previously noted, neither Dr. Geis nor Dr. Bieri could use those physical findings to appropriately reconstruct the preexisting impairment percentage. Further confusing the nature of Dr. Jones' rating was the fact, as pointed out by Dr. Bieri, that Dr. Jones rated disability as opposed to functional impairment.

Dr. Jones did not specify, when providing his opinion regarding claimant's rating, which edition of the *AMA Guides*, if any, he used when determining that rating percentage. And there was insufficient evidence to convert that rating to a percentage under the *AMA Guides*, Fourth Edition. Accordingly, the Board finds that respondent has failed in its burden of proving what, if any, preexisting functional impairment claimant may have suffered according to Dr. Jones.

Because Dr. Geis simply adopted Dr. Jones' 1988 rating to determine claimant's preexisting impairment, Dr. Geis' opinion is equally flawed. Had Dr. Geis reviewed Dr. Jones' medical records regarding claimant as well as additional physical findings regarding range of motion testing, if available, and used that information to determine a percentage of impairment pursuant to the *AMA Guides*, Fourth Edition, a different result could well have been achieved. But simply adopting the preexisting rating does not appropriately establish what, if any, preexisting functional impairment claimant may have had.

Lastly, Dr. Bieri offered an opinion that claimant had a 5 percent preexisting functional impairment. Dr. Bieri admitted that this was merely an estimate and that he derived that percentage using Dr. Jones' two range of motion findings. As previously noted, a rating based upon range of motion of the shoulder requires a determination of the range of motion in six planes and that the testing be done multiple times according to the *AMA Guides*, Fourth Edition. Using just two range of motion findings and estimating the remainder does not meet that standard. Moreover, Dr. Bieri further agreed that he could

not reconstruct a preexisting rating for claimant under the *AMA Guides*, Fourth Edition, using the information contained in Dr. Jones' letters. Again, this estimate testimony fails to meet the burden of proof to establish claimant's preexisting impairment.

As previously noted, there was testimony that a rating to the shoulder derived using the Third Edition Revised would be the same as a rating derived using the Fourth Edition. But there was no such testimony to establish that a rating derived using the Third Edition, or earlier editions would result in the same rating as derived using the Fourth Edition. In fact, Dr. Bieri testified that he did not know what methodology was used in the Third Edition. And other than the apparently mistaken belief Dr. Jones used the *AMA Guides*, Third Edition Revised, it was never established which edition, if any, Dr. Jones utilized.

The Board finds respondent failed in its burden of proving the percentage of claimant's preexisting functional impairment. Therefore, a reduction in the award of compensation for preexisting functional impairment under K.S.A. 44-501(c) (Furse 2000) is denied. The Board affirms the ALJ's Award.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 29, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant  
John A. Bausch, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director